EX PARTE OR LATE FILED

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September 30, 1999

Magalie Roman Salas, Secretary
Federal Communications Commission
445 12th Street S.W., TW-A-325
Washington, DC 20554

Re: **EX PARTE:** In the Matter of the Cheyenne River Sioux Tribe Telephone Authority's and US West Communications, Inc.'s Joint Petition for Expedited Ruling Preempting South Dakota Law, CC Docket No. 98-6

Dear Ms. Salas:

Pursuant to Section 1.1206 of the Commission's rule, 47 C.F.R. § 1.1206, an original and three copies of this letter are being submitted to the Office of the Secretary for inclusion in the public record.

Sincerely,

Lawrence E. Long
Chief Deputy Attorney General

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Re: **EX PARTE:** In the Matter of the Cheyenne River Sioux Tribe Telephone Authority's and US West Communications, Inc.'s Joint Petition for Expedited Ruling Preempting South Dakota Law, CC Docket No. 98-6

Dear Ms. Salas:

The purpose of this letter is to respond to the ex parte letter filed by the Cheyenne River Sioux Tribe Telephone Authority and US West on August 20, 1999. Three assertions are made by CRSTTA and US West. First, the Petitioners suggest that they were singled out for disparate treatment by SDPUC ("the only sales the PUC denied were those to the telephone authority . . .") (Petitioners' letter of August 20, 1999, at page 3). Second, the Petitioners suggest that the South Dakota Supreme Court wrongly decided the state statutory and federal equal protection issues, and the Commission should reverse the state court. Third, the Petitioners (for the first time) assert that CRSTTA is bound by Title VI of the Civil Rights Act of 1964 (and other federal anti-discrimination statutes), inviting the inference that the non-tribal member consumers would be adequately protected if the sales were allowed. Because these assertions are either misleading or inaccurate, a response is warranted.

I

CRSTTA WAS NOT SINGLED OUT FOR SPECIAL TREATMENT BY SDPUC.

CRSTTA asserts that the South Dakota Supreme Court erred in rejecting CRSTTA's state and federal equal protection claims. CRSTTA argues that they were treated disparately from the other numerous purchasers of US West's sixty-seven exchanges in that

"the only sales that the PUC denied were those to the Telephone Authority . . . ." (CRSTTA letter August 20, 1999, at page 3.) CRSTTA simply misstates the facts. The truth is that SDPUC denied another proposed sale, namely between US West and the City of Beresford Municipal Telephone System for the Alcester exchange. CRSTTA knows better, having previously acknowledged the denial of the Alcester sale in their Joint Petition in this action. See CRSTTA and US West Joint Petition, January 22, 1998, at 11 n.3). Furthermore, the South Dakota Supreme Court noted the denial of sale of the Alcester exchange. See Cheyenne River Sioux Tribe Authority and US West Communications, Inc. v. South Dakota PUC, et al., 1999 S.D. 60, ¶ 6 n.3. See also Decision and Order Regarding Sale of the Alcester Exchange, File No. TC94-122 Alcester, dated July 31, 1995, attached hereto as Exhibit A and incorporated by reference herein. Consequently, because CRSTTA bases its equal protection argument upon a faulty premise (disparate treatment), the argument fails.

Furthermore, CRSTTA and US West are precluded by the South Dakota Supreme Court decision from reasserting any argument before this Commission based upon a violation of equal protection under the state or federal Constitutions. Because they fully and fairly litigated those questions in the courts of the State of South Dakota below, the issues have been resolved (along with several others) by the highest court in the state of South Dakota. The South Dakota Supreme Court decision was issued on May 19, 1999. No appeal was taken by either side to the United States Supreme Court. The decision is now final. Under the doctrine of Rooker-Feldman, both CRSTTA and US West are precluded from relitigating or seeking review of those issues before this Commission. The Commission is likewise bound by the South Dakota Supreme Court determination on even the federal issues which were there decided.

II

THE SOUTH DAKOTA PUBLIC UTILITIES COMMISSION HAD JURISDICTION OVER THE ATTEMPTED SALE OF THE TELEPHONE EXCHANGES FROM US WEST TO CRSTTA, AND PARTICULARLY OVER THE SALE OF THE PORTION OF THE TIMBER LAKE EXCHANGE LOCATED ON THE CHEYENNE RIVER SIOUX INDIAN RESERVATION.

Although not made explicit, an implicit argument of US West and the Cheyenne River Sioux Tribe Telephone Exchange argument is that the South Dakota Public Utilities Commission simply lacked jurisdiction over the attempted sale of the reservation portion of one of the exchanges from US West to CRSTTA. That argument cannot be given any credence here. The South Dakota Supreme Court has now resolved that issue against the position of US West and CRSTTA and that disposition is binding upon the federal courts and upon this Commission.

A. The South Dakota Supreme Court Has Determined That the Sale of the Portion of the Timber Lake Exchange Located on the Cheyenne River Sioux Indian Reservation Is Within the Jurisdiction of the South Dakota Public Utilities Commission.

In the case entitled Cheyenne River Sioux Tribe Telephone Authority v. Public Utilities Commission of South Dakota, 1999 S.D. 60, US West and the CRSTTA argued that the PUC lacked jurisdiction over the sale of the portion of the Timber Lake exchange located on the Cheyenne River Sioux Indian Reservation. The Supreme Court of South Dakota squarely rejected that contention, finding:

> PUC had jurisdiction over the sale of the portion of the Timber Lake exchange located on the Cheyenne River Sioux Indian Reservation.

Id. at ¶ 13.

There was no appeal from that determination to the United States Supreme Court. Nothing, therefore, can remain of any claim that the South Dakota PUC lacked jurisdiction over the sale.

B. The Holding of the South Dakota Supreme Court That the South Dakota Public Utilities Commission Had Jurisdiction Over the Reservation Portion of the Timber Lake Exchange Is Binding Upon the Federal Courts and the FCC.

1. The Rooker-Feldman Doctrine Establishes the Binding Nature of State Court Determinations of Federal Law Issues.

In Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923), the Supreme Court considered whether a federal district court had jurisdiction to overturn a holding of the Indiana Supreme Court on the grounds that the state court ruling contravened the contract clause of the Constitution of the United States and the due process of law and equal protection clauses of the Fourteenth Amendment.

The Supreme Court found that the district court was without jurisdiction to entertain the claim. The Court found:

> If the constitutional questions stated in the bill actually arose in the cause, it was the province and duty of the state courts to decide them; and their decision, whether right or wrong, was an exercise of jurisdiction. If the decision was wrong, that did not make the judgment void, but merely left it open to reversal or modification in an appropriate and timely appellate proceeding. Unless and until so reversed or

> modified, it would be an effective and conclusive adjudication.

Rooker, 263 U.S. at 415. The United States Supreme Court then found that "no court of the United States other than this court could entertain a proceeding to reverse or modify the judgment for errors of that character." Id. at 416. Thus, the Supreme Court unmistakably found that a decision of the state court with regard to a federal question is conclusive unless overturned by the United States Supreme Court.

In District Court of Appeals v. Feldman, 460 U.S. 462 (1983), the United States Supreme Court affirmed and explicated the Rooker doctrine. The Court noted that, "a United States District Court has no authority to review final judgments of a state court in judicial proceedings." Feldman, 460 U.S. at 482. The Court also noted that, "If the constitutional claims presented to a United States District Court are inextricably intertwined with the state court" decision, the District Court may not entertain the claim. Id. at 482 n.16.

The Eighth Circuit Court of Appeals has in turn explained that:

> A federal claim is inextricably intertwined with a state court judgment when 'the relief requested in the federal action would effectively reverse the state court decision or void its ruling.'

Canal Capital Corporation v. Valley Pride Pack, Inc., 169 F.3d 508, 512 (8th Cir. 1999) (quoting Bechtold v. City of Rosemount, 104 F.3d 1062, 1065 (8th Cir. 1997)).

Canal Capital Corporation further stated the rule as prohibiting an action in district court when the result would be "'determining the state court's decision is wrong or would void its ruling.'" Canal Capital Corporation, 169 F.3d at 512 (quoting Charchenko v. City of Stillwater, 47 F.3d 981, 983 (8th Cir. 1995)). See also Johnson v. DeGrandy, 512 U.S. 997, 1005-6 (1994) (Rooker-Feldman doctrine applies only to parties to action in state court); Johnson v. Supreme Court of Illinois, 165 F.3d 1140 (7th Cir. 1999); Bechtold v. Rosemount, 104 F.3d 1062 (8th Cir. 1997).

It is plain that the Rooker-Feldman doctrine prohibits the federal agency from determining the question of whether the South Dakota PUC had jurisdiction.

2. The Doctrine of Preclusion Operates to Prevent Relitigation of Federal Claims Decided by State Courts.

Moreover, the doctrine of preclusion prevents relitigation of the finding of the South Dakota Supreme Court that the PUC had

jurisdiction of the matter. The Court of Appeals for the Eighth Circuit has found:

> A prior state court decision receives the same preclusive effect in federal court as it would receive in the state court. 28 U.S.C. § 1738 (1994).

Charchenko, 47 F.3d at 984.

Accordingly, South Dakota law determines the scope of preclusion, including but not limited to "issue preclusion" in this case. According to Matter of Estate of Nelson, 330 N.W.2d 151, 157 (S.D. 1983):

> Collateral estoppel serves as issue preclusion for all issues that were actually fully and fairly litigated in the first lawsuit.

The Court continued:

> Another way of viewing collateral estoppel is to say that it compels the second court to make the same finding on an identical issue as the first court made.

Id.

Again, it is clear that, under the doctrine of preclusion, a federal agency must give the preclusive effect to the state court determination of jurisdiction of the PUC because the state courts would give such preclusive effect to the South Dakota Supreme Court decision.

The Second Circuit Court of Appeals in Deerfield v. Federal Communications Commission, 992 F.2d 420 (2d Cir. 1992), confirms the preclusive effect the FCC is to give to the state court determination. In that case, the city of Deerfield adopted a zoning ordinance which prohibited the installation of satellite dish antennas on lots of less than one-half acre. Deerfield, 992 F.2d at 423. Mr. Carino, a resident of Deerfield, was charged with a violation of the Deerfield ordinance, but the proceeding was held in abeyance while he attempted to obtain a building permit and a variance from the city. Both were denied by the city. Carino then wrote the FCC requesting its help, which did not occur.

In the meantime, Mr. Carino took his proceeding to state court. The state court found that Carino failed to meet the requirements necessary to obtain a variance. The state court also found, id. at 425, that the

> zoning ordinance did not discriminate against satellite-dish antennas and therefore was not preempted by section 25.104 of FCC regulations.

Carino did not seek review in the United States Supreme Court, but took his case to federal district court. According to the Court of Appeals, on review of the district court decision, that court had found that the "preemption issue had been fully and fairly litigated and necessarily decided in the New York action. . . . In so ruling, the district court observed, correctly, that 'even if the state court erred, that does not mean that this Court can disregard the preclusive effect of the prior state court proceeding.'" Deerfield, 992 F.2d at 425.

The United States Court of Appeals thus affirmed the holding of the district court, and Mr. Carino filed a petition for declaratory ruling with the FCC. The FCC ruled that it had jurisdiction and ruled that the Deerfield zoning ordinance was preempted by section 25.104. 992 F.2d at 446.

The Court of Appeals reversed the FCC. The Court of Appeals ruled that review of a prior decision by the federal court of appeals may be had only in the Supreme Court and that a federal administrative agency may not "choose simply to ignore a federal court judgment." 992 F.2d at 428. The Court of Appeals held that it was

> undisputed that the Carino I court [the state court] had jurisdiction over Carino's suit . . . and it had the power to decide the preemption issue, for federal courts have not been given exclusive jurisdiction over such questions.

Deerfield, 992 F.2d at 429. The court continued:

> It is also clear that the state courts would give the ruling in Carino I [the state court proceeding] preclusive effect in any subsequent New York litigation between Carino and Deerfield. . . . Thus, the Carino III court [the federal court] presented by Carino with precisely the same preemption issue he had raised in Carino I [the state court proceeding] was required by 28 U.S.C. § 1738 to accord the Carino I judgment the same preclusive effect.

Deerfield, 992 F.2d at 429. The court held that:

> The FCC's 1992 Decision, by refusing to recognize the conclusive effect of the judgment in Carino III, does not comport with the above legal principles.

Id.

Deerfield, while not on all fours with this case, is nonetheless controlling. Deerfield holds that a federal court must give the same preclusive effect on review of an FCC proceeding to a state court judgment as a state court would give. It follows that the federal agency must itself give such deference to the state court proceeding. A federal agency which is subject to judicial review in the federal courts cannot logically fail to apply this legal rule applicable to those very federal courts. Deerfield disposes of this question and mandates a finding that the state court findings are in fact binding upon the FCC here.

III

WHETHER THE FEDERAL COMMUNICATIONS COMMISSION SHOULD PREEMPT THE OPERATION OF SDCL 49-31-59 WITH REGARD TO A SALE BETWEEN US WEST AND CRSTTA, WHEN THE SOUTH DAKOTA PUBLIC UTILITIES COMMISSION, THE STATE CIRCUIT COURT, AND THE SOUTH DAKOTA SUPREME COURT, HAVE EACH DETERMINED FOR DETAILED REASONS THAT THE SALE WOULD NOT BE IN THE PUBLIC INTEREST.

US West and CRSTTA claim that this Commission's powers should be invoked to preempt the operation of SDCL 49-31-59 to the sale by US West of three telephone exchanges to the Cheyenne River Sioux Tribe. The statute at issue, SDCL 49-31-59, states:

> The Legislature recognizes that the sale of telephone exchanges has a profound impact upon South Dakota, especially during a time when the world is undergoing a revolution in telecommunications technology. Because the sale of any exchange in our state directly affects the continued vitality and viability of rural South Dakota during that revolution, it is the Legislature's intent that the sale of each exchange be held to a high degree of scrutiny. Any sale of a telecommunications exchange shall be approved by a vote of the Public Utilities Commission. A separate vote is required on the sale of each exchange. In voting, the commission shall, if applicable, consider the protection of the public interest, the adequacy of local telephone service, the reasonableness of rates for local service, the provision of 911, Enhanced 911, and other public safety services, the payment of taxes, and the ability of the local exchange company to provide modern, state-of-the-art telecommunications services that will help promote economic development, tele-medicine, and distance learning in rural South Dakota. The commission shall issue its order pursuant to this section within one hundred eighty days of the filing of the application. For any application filed on or

before March 30, 1995, the commission shall issue its order no later than August 1, 1995.

US West and CRSTTA assert that this statute should be preempted on the basis of the following statutes:

(a) **In general.** No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

(b) **State regulatory authority.** Nothing in this section shall affect the ability of a State to impose, on a competitively basis and consistent with section 254, requirements necessary to preserve and advance universal services, and safeguard the rights of consumers.

. . . .

(d) **Preemption.** If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

A. 47 U.S.C. § 253(a) Provides No Grounds for Preemption.

1. SDCL 49-31-59 Does Not Prohibit CRSTTA From Providing Any Interstate or Intrastate Telecommunications Service.

To succeed in its claim under this section, the burden is on the proponents of preemption to demonstrate that they are actually prohibited or at least "materially inhibited" from providing any interstate or intrastate telecommunications service. In the Matter of Public Utilities Commission of Texas, 13 FCCR 3460, ¶ 3 (1997).

As we set out in our opening brief, this they have failed to do. CRSTTA may purchase from US West the services it wishes to provide for resale regardless of the operation of SDCL 49-31-59. In fact, 47 U.S.C. § 251 imposes binding obligations upon US West as the local exchange carrier to sell any such service to CRSTTA. See In the Matter of Public Utilities Commission of Texas, 13 FCCR 3460, ¶ 2 (1997). As this Commission has held, preemption

is not available when a prospective carrier can, as here, "choose to provide telecommunications services . . . by obtaining unbundled network elements from incumbent LECs, reselling incumbent LEC services, utilizing their own facilities, or employing any combination of these three options." Id. at ¶ 119.

2. The Requirements of SDCL 49-31-59 Do Not Limit the Ability of CRSTTA to Compete in a "Fair and Balanced Legal and Regulatory Environment."

This Commission has defined its task, in determining whether a violation of 47 U.S.C. § 253(a) has been proven, as follows:

> we consider whether the requirement in question materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.

In the Matter of the Petition of Pittencrieff Communications, Inc. for a Declaratory Ruling Regarding Preemption, 13 FCCR 1735, ¶ 32 (1997). See also In the Matter of the Public Utilities Commission of Texas, 13 FCCR 3460, ¶ 22 (1997). We submit that it cannot be shown that the state statute in question operates to deprive CRSTTA of the ability to "compete in a fair and balanced legal and regulatory environment." Indeed, the findings of the South Dakota Supreme Court authoritatively indicate that, if the CRSTTA obtains ownership of the exchanges now owned by US West, the legal and regulatory environment created will be unfair to consumers and unbalanced in the extreme.

Thus, the South Dakota Supreme Court, in Cheyenne River Sioux Tribe Telephone Authority and US West v. Public Utilities Commission of South Dakota, 1999 S.D. 60, ¶ 39, affirmed the findings of the South Dakota Public Utilities Commission to the effect that the sale of the three exchanges was not in the "public interest" because it would create a regime in which the majority of consumers of the telecommunications service could not participate in the regulatory process. Moreover, it would create a situation in which the PUC was deprived of its ability to demand that the CRSTTA supply basic services, and in which the PUC would be unable to demand even that the then-existing obligations of US West be carried out.

In particular, the Supreme Court affirmed the findings that the sale would not be in the "public interest" because, inter alia:

2. The lack of regulatory control by [PUC] would mean that [PUC] would be unable to set conditions of sale that must be followed by CRSTTA;

3. [PUC] is unable to require as a condition of sale that CRSTTA offer all existing services that are currently offered by US WEST;

4. [PUC] is unable to require as a condition of the sale that CRSTTA honor all existing US WEST contracts and agreements;

5. The lack of regulatory control and the lack of the ability of the majority of subscribers to vote or have a political voice in CRSTTA could negatively affect adequacy of service;

6. [PUC] is unable to require as a condition of sale that CRSTTA not increase the current local rates for 18 months;

7. [PUC] is unable to require as a condition of the sale that CRSTTA not change any current extended area service arrangements without prior approval by [PUC]; and

8. [PUC] is unable to require CRSTTA to make any improvements necessary for the public's safety, convenience, and accommodation as allowed by SDCL 49-31-7.

Id. We have established above that the findings of the state supreme court are binding in this matter on the parties and the Commission under the Rooker-Feldman doctrine and the preclusion doctrine. See, e.g., Canal Capital Corporation, 169 F.3d at 512; Charchenko, 47 F.3d at 983.

These findings of the South Dakota Supreme Court, moreover, are "inextricably intertwined" with any claim that SDCL 49-31-59 operates to prohibit CRSTTA from competing in a "fair and balanced legal and regulatory environment." As the Court of Appeals explained in Charchenko, 47 F.3d at 983:

> A claim is inextricably intertwined if the federal claim succeeds only to the extent that the state court wrongly decided the issues before it. In other words, Rooker-Feldman precludes a federal action if the relief requested in the federal action would effectively reverse the state court decision or void its ruling.

It could not be found, for example, that a "fair and balanced legal and regulatory environment" would be created by a situation in which the "majority of subscribers lack . . . regulatory control." Cheyenne River, 1999 S.D. 60, ¶ 39. Nor could it be found that CRSTTA is restrained from operating in a "fair and balanced legal and regulatory environment" when the state

regulatory commission is unable to institute controls on the conditions of proposed sale, to require CRSTTA to continue to offer existing services, to require CRSTTA to not increase local rates for eighteen months, or to require CRSTTA to make improvements necessary for the public's safety, convenience, and accommodation. Id.

That the matters are "inextricably intertwined" also follows from the conclusion that, if the FCC were to find that the South Dakota Supreme Court had incorrectly decided the issues identified, it would effectively destroy the "finality" of the state court decision and defeat a rationale of "Rooker-Feldman" which is "ensuring that litigants do not take multiple bites from the same apple." Guarino v. Larsen, 11 F.3d 1151, 1157 (3d Cir. 1993). See also In re Goetzman, 91 F.3d 1173, 1177 (8th Cir. 1996).

Finally, were the FCC to determine a "balanced and fair legal environment" was created by the sale, and in so doing implicitly or otherwise determined that the findings of the South Dakota Supreme Court alluded to above were incorrect, it would be determining that the "state court's decision was 'wrong,'" and, therefore, the Rooker-Feldman doctrine would be violated. Canal Capital Corporation, 169 F.3d at 513.

It follows that there has been no violation of 47 U.S.C. § 253(a).

B. The State's Ability to Impose SDCL 49-31-59 on All Sales of Exchanges Is Amply Supported by 47 U.S.C. § 253(b).

As this Commission has found, even if the strictures of 47 U.S.C. § 253(a) are violated (which we strongly contend has not occurred here), preemption may not occur if the requisites of 47 U.S.C. § 253(b) are met. These requisites are discussed below in the context of the binding findings of the South Dakota Supreme Court.

1. The Requirements of SDCL 49-31-59 Are Imposed on a "Competitively Neutral Basis."

There could be no doubt that the statute is "competitively neutral." The statute is applied to "any sale of a telecommunication exchange," regardless of to whom the sale is made. SDCL 49-31-59. Moreover, as found by the South Dakota Supreme Court, the statute

> treats any such potential purchaser of a telephone exchange uniformly, and does not create arbitrary classifications.

Cheyenne River Sioux Tribe Telephone Authority, 1999 S.D. 60, ¶ 48. The Court stressed that this statute required the PUC to consider "the same factors in voting on each individual sale" and that the "statute applies equally to all." Id. Thus, the statute is "competitively neutral."

2. The Application of SDCL 41-31-59 Was Not Discriminatory.

In the "Suggested Guidelines for Petition for Ruling Under Section 253 of the Communication Act," FCC 98-295, November 17, 1998, the Commission suggests that it is appropriate, in a section 253(b) analysis, to examine whether the statute is "nondiscriminatory."

The South Dakota Supreme Court has found that "the statute applies equally to all and does not arbitrarily classify those subject to it." Cheyenne River Sioux Tribe Telephone Authority, 1999 S.D. 60, ¶ 48. The Court, in fact, held that the statute, in its application to the tribe here, "did not constitute a denial of equal protection under the law in violation of the Fourteenth Amendment to the United States Constitution." Id. at ¶ 41.

If the tribe was unsatisfied with that holding, it had an obligation to appeal it to the United States Supreme Court. Not having done so, the matter is definitively concluded against the tribal position.

3. The Application of SDCL 49-31-59 to the Tribe in This Instance Is "Necessary to Safeguard the Rights of Consumers."

Both the text of the statute, 47 U.S.C. § 253(b) and the "Suggested Guidelines" indicate that a state can claim the protection of the statute if its regulation is necessary to "safeguard the rights of consumers." The South Dakota Supreme Court's findings completely dispose of this issue. Those findings determined that the application of SDCL 49-31-59 was appropriate, and that the sales "would not be in the public's best interest for the following reasons:

1. Since CRSTTA maintains there is no enforcement mechanism that would require CRSTTA to pay gross receipts taxes, approval of the sale would result in the loss of significant tax revenue for the cities, counties, and school districts located within the . . . exchange[s];

2. The lack of regulatory control by [PUC] would mean that [PUC] would be unable to set conditions of sale that must be followed by CRSTTA;

3. [PUC] is unable to require as a condition of sale that CRSTTA offer all existing services that are currently offered by US WEST;

4. [PUC] is unable to require as a condition of the sale that CRSTTA honor all existing US WEST contracts and agreements;

5. The lack of regulatory control and the lack of the ability of the majority of subscribers to vote or have a political voice in CRSTTA could negatively affect adequacy of service;

6. [PUC] is unable to require as a condition of sale that CRSTTA not increase the current local rates for 18 months;

7. [PUC] is unable to require as a condition of the sale that CRSTTA not change any current extended area service arrangements without prior approval by [PUC]; and

8. [PUC] is unable to require CRSTTA to make any improvements necessary for the public's safety, convenience, and accommodation as allowed by SDCL 49-31-7.

Cheyenne River Sioux Tribe Telephone Authority, 1999 S.D. 60, ¶ 39.

Thus, the South Dakota Supreme Court's central finding, supported by detailed subordinate findings, was that the sale should not be allowed in that it was not in the "public interest" for the reason that the rights of consumers would not be safeguarded if the sale were consummated. Id.

In particular, the Court's "public interest" finding flowed from the findings that the sale would deprive the "majority of subscribers" of a voice in the regulations which could "negatively affect adequacy of service." Id. Moreover, the Court found that the sale risked the rights of consumers because it gave them no protection against an "increase [of] the current local rates for 18 months"; because the consumers had no assurance that the new owners would "offer all existing services"; that it could not require the new owners to "honor all existing US WEST contracts and agreements"; and that it could not require "improvements necessary to the public's safety, convenience and accommodation." Id.

These findings of the South Dakota Supreme Court, binding on the parties here, compel a finding in the FCC that the requisites of

47 U.S.C. § 253(b) have been met in that the application of SDCL 49-31-59 was necessary to "safeguard the rights of consumers."

Moreover, the same findings of the Court indicate that the application of the section is necessary to "preserve and advance universal service, protect the public safety and welfare, [and] ensure the continued quality of telecommunication services." 47 U.S.C. § 253(b). As the Supreme Court has in effect found, provision of these services to consumers is most definitely not "ensure[d]" in the event of a sale to CRSTTA. See 47 U.S.C. § 253(b).

4. The Provision of 47 U.S.C. § 253(b) Which Requires Consistency With "Section 254" Supports the Application of SDCL 49-31-59 in This Instance.

47 U.S.C. § 253(b) requires consistency with section 254, which, in turn, provides critical functions for states in the new telecommunications environment. 47 U.S.C. § 254(b)(5) (emphasis added) states:

> There should be specific, predictable, and sufficient Federal and State mechanisms to preserve and advance universal service.

47 U.S.C. § 254(f) (emphasis added) states:

> A State may adopt regulations not inconsistent with the Commission's rules to preserve and advance universal service.

47 U.S.C. § 254(i) (emphasis added) states:

> The Commission and the States should ensure that universal service is available at rates that are just, reasonable and affordable.

These factors together emphasize the critical role that the states retain in the regulatory process. The states are to act to "preserve and advance universal service" and to "ensure that universal service is available at rates that are just, reasonable and affordable." The term "State" includes the District of Columbia and the "Territories and possessions," 47 U.S.C. § 153(40) but does not include the term "tribe." In the Matter of AB Fillins, 12 FCCR 11755, ¶¶ 2, 16 (1997).[1]

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[1] Congress has, in a few instances, provided that Indian tribes may be treated as states but has not done so here. See, e.g., Clean Water Act, 33 U.S.C. § 1377(e). See also South Dakota v. Bourland, 508 U.S. 679, 697-97 (1993) (rejecting federal argument that "local" laws included tribal laws). It is nonetheless worth

(continued...)

As the findings made by the South Dakota Supreme Court indicate, the application of SDCL 49-31-59 does in fact "ensure that universal service is available at rates that are just, reasonable and affordable" and the failure to apply the section would result in the state being forced by the Commission to abandon a duty assigned to it by federal law.[2]

IV

THE FCC CANNOT, CONSISTENT WITH 47 U.S.C. § 254, MANDATE SALE OF THE EXCHANGES AT ISSUE TO THE CRSTTA.

As we have set forth above, 47 U.S.C. § 254 imposes various duties upon the State. The State, along with this Commission, is to provide "mechanisms to preserve and advance universal service" and that furthermore the State, along with this Commission, is to "ensure that universal service is available at rates that are just, reasonable and affordable." 47 U.S.C. § 254(j).

As the findings by the South Dakota Supreme Court indicate, the State will be unable to undertake these duties if the exchanges are sold to the CRSTTA. We, therefore, suggest that the FCC may not, as a matter of federal law, preempt state authority in this instance, for to do so would deprive the State of South Dakota of duties mandated to it and functions allowed to it under 47 U.S.C. § 254. See generally In the Matter of the Public Utilities Commission of Texas, 13 FCCR 3460, ¶ 51 (1997) (1996 Act is not to be construed to impliedly preempt state law).

(...continued)
noting that if such action is taken, it must be taken by Congress itself, and not the agency, Backcountry Against Dumps v. EPA, 100 F.3d 147, 150-51 (D.C. Cir. 1996), and that any such congressional action must be in accord with the dictates of the Constitution. See generally Duro v. Reina, 495 U.S. 676, 693-94 (1990).

[2] The comment in In the Matter of the Public Utilities Commission of Texas, 13 FCCR 3460, ¶ 190 (1997), that there are "questions concerning possible regulatory bias when separate arms of a municipality act as both a regulator and competitor" indicates that the FCC sees difficulties when one body acts as both "regulator and competitor." Here, of course, the problem is aggravated. One body, the Tribe, would purport to regulate itself and the competition, while excluding a majority of the subscribers from the process. We submit, in the alternative to the argument made above, that these facts indicate that the FCC should find that the action of the South Dakota PUC was justified to protect consumers and to ensure the services identified in federal statute, see 47 U.S.C. §§ 253(b) and 254, even if the South Dakota Supreme Court had not acted.

V

NEITHER TITLE VI OF THE CIVIL RIGHTS ACT OF 1964 NOR OTHER FEDERAL ANTI-DISCRIMINATION STATUTES HAVE ANY MEANINGFUL APPLICATION IN THIS PROCEEDING.

CRSTTA's letter of August 20, 1999, at page 2, makes the following statement:

> The Telephone Authority is the recipient of federal financial assistance from the United States Department of Agriculture's Rural Utilities Service, and is subject to the provisions of Title VI of the Civil Rights Act of 1964, as amended, Section 504 of the Rehabilitation Act of 1973, as amended, the Age Discrimination Act of 1975, as amended, and the rules and regulations of the United States Department of Agriculture which provide that no person in the United States on the basis of race, color, national origin, age or handicap shall be excluded from participation in, admission or access to, denied the benefits of, or otherwise be subjected to discrimination in any of the Telephone Authority's, or its subsidiaries', programs or activities.

Two points need to be made about the above statement. First, if the quoted statement is true, why has CRSTTA waited until now to assert it? This argument was not raised before Judge Zinter at any time prior to his decision to remand the case to SDPUC on February 21, 1997. CRSTTA did not raise the issue during the remand proceedings in front of SDPUC which resulted in the second denial of the sales on August 22, 1997. CRSTTA did not raise the issue during the second appeal when Judge Zinter reaffirmed the denials on February 20, 1998. CRSTTA did not raise the issue at any time during the appellate proceedings which resulted in the South Dakota Supreme Court decision on May 19, 1999. In the interim, neither CRSTTA nor US West raised the issue before this Commission from January 22, 1998, until three weeks ago.

Second, by making the assertion, CRSTTA hopes the Commission will conclude that the non-Indian and non-Cheyenne River tribal members of the Morristown, McIntosh, and Timber Lake telephone exchanges are adequately protected by these various federal statutes from discriminatory conduct at the hands of CRSTTA. The protections are illusory.

The result in Dillon v. Yankton Sioux Tribe Housing Authority, 144 F.3d 581 (8th Cir. 1998), demonstrates that CRSTTA's power to discriminate against its customers is not meaningfully impaired by federal law. Dillon, a non-Indian employee of the Yankton Sioux Housing Authority, was terminated because (allegedly) he

was white. He sued under various civil rights statutes in the United State District Court. The United States District Court granted summary judgment in favor of the Housing Authority under tribal sovereign immunity. Dillon argued that his status was protected because the Housing Authority received federal financial assistance from the Department of Housing and Urban Development and had by contract agreed that the tribal Housing Authority:

> [S]hall comply with all statutory, regulatory, and executive order requirements pertaining to civil rights, equal opportunity, and nondiscrimination, as those requirements now exist, or as they may be enacted, promulgated, or amended from time to time. These requirements include, but shall not be limited to, compliance with at least the following authorities: Title VI of the Civil Rights Act . . . the Fair Housing Act . . . section 504 of the Rehabilitation Act of 1973 . . . the Age Discrimination Act of 1975 . . . the Americans with Disabilities Act . . . Executive Order 11063 on Equal Opportunity in Housing . . . Executive Order 11246 on Equal Opportunity in Housing . . . Executive Order 11246 on Equal Employment Opportunity, as amended by Executive Order 11375 . . . and Executive Order 12892 on Affirmatively Furthering Fair Housing. An Indian Housing Authority established pursuant to tribal law shall comply with applicable civil rights requirements, as set forth in Title 24 of the Code of Federal Regulations.

144 F.3d at 583 n.2. The Eighth Circuit Court concluded that the above-quoted paragraph offered no protection to Dillon, finding that "[b]ecause the Authority did not explicitly waive its sovereign immunity, we lack jurisdiction to hear this dispute." 144 F.3d at 584 (footnote omitted). The various federal statutes quoted by CRSTTA in page 2 of its letter simply do not provide any meaningful protection to customers of CRSTTA, regardless of where they are located.

CONCLUSION

For the reasons previously stated, the Commission should deny the petition of CRSTTA and US West.

Respectfully submitted,

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